139-216

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1159.

THE NORTHWESTERN FUEL COMPANY, PLAINTIFF IN ERROR,

vs.

R. G. BROCK AND G. T. McKENZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED APRIL 26, 1890.

Statute of Frauds, and our Act of 1772, are satisfied by a note in writing *not* under seal and signed only by the party called on to fulfill it, if the other has accepted it; Bird vs. Blosse, 2 Vent., 361; Moore vs. Hart, 2 Ohio R., 167; Wankford vs. Fotherby, 2 Vern, 322; Long vs. Mehaffey, 10 W., 387. Nay, it has even been ruled that an agreement in the hand writing of the party to be affected by it, beginning "I, A. B., agree, &c.," is sufficiently signed within the Statute; Knight vs. Crockford, 1 Esp. N. P. C., 190, cited in 2 Bos. & Pul. 239, by Ld. Eldon; 1 Madd. Ch., 372, et seq. There is another well ascertained principle, proper to be noticed, as applicable to the inquiry we are now prosecuting. It is, that executory contracts for the sale of lands, like wills, are interpreted to give effect to the intention of the parties."

From the cases cited, it would seem that the law upon the several questions raised had been settled, and that the judge below was thoroughly familiar with it. With care he answered the points submitted to him, by the defendants below, and we think fully as favorably as they had any right to ask.

The facts proven were for the jury, and certainly no error was committed by the judge below in allowing the jury to perform their share of the duties of the trial.

The charge of the Court was impartial and the verdict of the jury was clearly warranted by the evidence.

WOLF & GEORGE,
DAVENPORT & GRIFFITH,
Attorneys for Defendants in Error.

D. A. Davenport

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INDEX.

	Original.	Print.
Caption	1	1
Mandate of Supreme Court United States	1	1
Notice of motion for judgment, &c.	5	3
Motion for judgment, &c.	6	3
Order for execution on mandate	8	4
Order granting leave to plaintiff to file amendment to petition	10	5
Order for execution for cost of transcript	11	6
Notice of attorneys' lien	11	6
Trial notice	13	7
Amendment to motion for restitution, &c.	14	7
Order taking motion for restitution under advisement	15	8
Judgment	16	8
Writ of error (copy)	17	9
Bond	19	10
Assignment of errors (copy)	22	11
Prayer for reversal (copy)	25	13
Citation (copy)	26	14
Clerk's certificate	28	15
Citation (original)	29	15
Writ of error (original)	30	15
Assignment of errors and prayer for reversal (original)	31	16
Clerk's certificate	35	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1890.

1 THE UNITED STATES OF AMERICA, *Northern District of Iowa,* } *ss:*

Pleas before the circuit court of the United States in and for the northern district of Iowa, eastern division, at a term begun and holden at Dubuque, in said district, on the 26th day of November, A. D. 1889, the same being the 4th Tuesday of November, A. D. 1889, before the Honorable Oliver P. Shiras, judge of said court.

THE NORTHWESTERN FUEL COMPANY, Plaintiff,
vs.
R. G. BROCK & G. T. MCKENZIE, Defendants. } No. 66. Law.

Be it remembered that heretofore, to wit, of the 14th, day of June, A. D. 1889, a mandate from the honorable Supreme Court of the United States in said cause was filed in the office of the clerk of the United States circuit court in and for the northern district of Iowa in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the
[SEAL.] northern district of Iowa, Greeting:

Whereas lately, in the circuit court of the United States
2 for the northern district of Iowa, before you or some of you, in a cause between The Northwestern Fuel Company, plaintiff, and R. G. Brock and G. T. McKenzie, copartners, defendants, wherein the judgment of the said circuit court, entered in said cause on the 15th day of June, A. D. 1883, is in the following words, viz:

"In above cause the motion for a new trial filed by the defendant having been submitted to the court is duly considered and by the court overruled.

And thereupon, plaintiff moving for judgment upon the verdict of the jury—

It is considered, ordered, and adjudged that The Northwestern Fuel Company, the plaintiff herein, have and recover judgment against R. G. Brock and G. T. McKenzie, defendants herein, for the sum of fourteen hundred and two $\frac{47}{100}$ dollars ($1,402.47), with interest, at six per cent. per annum, from April 23, 1883, and costs of suit, taxed at $—, and that execution issue therefor," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-eight, the said cause came on to be heard before the said Supreme Court on the said
3 transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered and ad-

judged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said defendants recover against the said plaintiff, The Northwestern Fuel Company, two hundred and forty-two dollars and seventy-five cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings in accordance with law.

APRIL 8, 1889.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of defendants:

Clerk	$99 75
Printing record	123 00
Attorney	20 00
	$242 75

Costs of R. G. Brock & G. T. McKenzie, copartners, &c., in No. 210:

1885.	Docketing cause and filing record, $5.00; Oct. term, appearance, .25; filing præcipe, .25; filing papers, .50; continuance, .25	6 25
1886.	Oct. term, transfer, 1.00; continuance, .25	1 25
1887.	Oct. term, transfer, 1.00; filing papers, .25; continuance, .25	1 50
1888.	Oct. term, transfer, 1.00; filing receipt, .25; filing papers, 2.25; filing briefs, 5.00; argument, .20; judgment, 1.00; filing same, .25; recording proceedings, .40; mandate, 5.00; preparing record for printer, &c., 75.00; costs and copy, .40; printing record, 123.00; attorneys' docket fee, 20.00	233 75
		$242 75

Fee Book A. B., page 107.
Test:

JAMES H. McKENNEY,
C. S. C. U. S.

(Endorsed:) No. 66. Law. Supreme Court of the United States. No. 210. October term, 1888. R. G. Brock & Co. *vs.* The Northwestern Fuel Company. Mandate. Filed June 15th, 1889. A. J. Van Duzee, clerk.

5 And afterwards, to wit, on the said 15th day of June, A. D. 1889, there was filed in the office of the clerk of said court a notice and motion; which notice and motion are in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*, Copartners.

Notice.

To the above-named plaintiff or to Messrs. C. D. O'Brien, Henderson, Hurd & Daniels, and F. C. Hormel, its attorneys:

You are hereby notified that on Saturday, the 15th day of June, 1889, at ten o'clock a. m., or as soon thereafter as counsel can be heard, the defendants will bring on for hearing before the court in the above-entitled action a motion, a copy of which is hereunto annexed, and that the defendants will use affidavits and oral evidence in support of said motion. You are requested to appear at the above-mentioned time and resist said motion, if you desire to do so.

CHAS. A. CLARK,
Att'y for Defendants.

6 In the Circuit Court of the United States, Nortern District of Iowa, Eastern Division.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*, Copartners.

Motion.

Come now defendants in above-entitled action and file mandate from the Supreme Court of the United States reversing the judgment heretofore rendered of record by this honorable court in said action; and thereupon the said defendants move the court as follows:

1. That they have judgment against the plaintiff for the costs in the Supreme Court of the United States shown by said mandate, together with the costs of transcript from this court to the Supreme Court, namely, $86.00, and that execution issue therefor.

2. The defendants show to the court that the plaintiff collected on the judgment heretofore rendered herein the sum of $1,000.00, which has been and is in no manner credited on said judgment.

The defendants therefore move the court for a summary inquiry as to the amount so collected by the plaintiff on said judgment, and that such amount be credited on said judgment as of the date when the same was collected.

3. The defendants move the court for judgment against the
7 plaintiff for the full amount by it collected, with interest on such amount, at six per cent., from the 1st day of April, 1884, and that the defendants have writ of execution of the resyitution for such sum.

4. The defendants further move the court, in accordance with the mandate and opinion of the United States Supreme Court, that this action be dismissed at plaintiff's costs, unless the plaintiff shall forthwith by amendment show a cause of action of which this court has jurisdiction.

CHAS. A. CLARK,
Att'y for Defendants.

(Endorsed:) No. 66. Law. Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Notice and motion. Filed June 15th, 1889. A. J. Vanduzee, clerk.

8 And afterwards, to wit, on the 15th day of June, A. D. 1889, the same being the 36th day of the April term, A. D. 1889, of said court, the following proceedings were had in said cause, as appears of record on folio- 581 & 582 of the record No. 2 of said court, to wit:

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*
} No. 66. Law.

Now, this 15th day of June, A. D. 1889, there is filed in the court the mandate of the United States Supreme Court, which is in words and figures following:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Whereas lately, in the circuit court of the United States for the northern district of Iowa, before you or some of you, in a cause between The Northwestern Fuel Company, plain-iff, and R. G. Brock and G. T. McKenzie, copartners, defendants, wherein the judgment of said circuit court entered in said cause on the 15th day of June, A. D. 1883, is in the following words, viz: "In above cause the motion for a new trial filed by the defendant having been submitted to the court, is duly considered and by the court overruled, and thereupon, plaintiff moving for judgment upon the verdict of the jury—

9 It is considered, ordered, and adjudged that The Northwestern Fuel Company, the plaintiff herein, have and recover

judgment against R. G. Brock and G. T. McKenzie, defendants herein, for the sum of fourteen hundred and two $\frac{47}{100}$ dollars ($1,402.47), with interest, at six per cent. per annum, from April 23, 1883, and costs of suit, taxed at $—, and that execution issue therefor, as by the inspection of the transcript of the record of said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeaboy to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-eight, the said cause came on to be heard before the Supreme Court on the said transcript of record and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said defendants recover against the said plaintiff, The Northwestern Fuel Company, two hundred and forty-two dollars and seventy-five cents for their costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings in accordance with law.

APRIL 8, 1889.

You, therefore, are hereby commanded thay such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of defendants:

Clerk	99 75
Printed record	123 00
Attorney	20 00
	$242 75

Now, therefore, in accordance with the foregoing mandate and upon the motion of Chas. A. Clark, Esq., attorney for defendants—

It is ordered by the court that defendants have execution against plaintiff for said costs mentioned in said mandate, to wit, $242.75.

THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*
} No. 66. Law.

This cause coming before the court this 15th day of June, A. D. 1889, upon the motion of defendants for judgment, &c., defend-

ants appearing by Charles A. Clark, Esq., and plaintiff appearing by Henderson, Hurd, Daniels & Keisel—

It is ordered that plaintiff *has* leave to file, on or before September 1st, 1889, an amendment to petition herein as to the jurisdiction of this court.

11 THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK & G. T. MCKENZIE. } No. 68. Law.

Now, this 15th day of June, A. D. 1889, this cause coming before the court upon the motion of defendants for judgment for the amount paid by defendants for the transcript to the Supreme Court of the United States—

It is ordered and adjudged that defendants, R. G. Brock and G. T. McKenzie, have and recover from the plaintiff, The Northwestern Fuel Company, the sum of eighty-four & $\frac{35}{100}$ dollars ($84.35), and that they have execution therefor.

And afterwards, to wit, on the 18th day of June, A. D. 1889, there was filed in the office of the clerk of said court a notice of attorneys' lien; which notice is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*

Notice of Attorneys' Lien.

12 The undersigned, attorneys for defendants in the above-entitled action, hereby give notice that they claim a lien of four hundred dollars ($400) on the judgment of the United States Supreme Court and of the circuit court of the United States within and for the northern district of Iowa, eastern division, which judgments are in favor of said defendants and against the plaintiff, for the costs on writ of error to the United States Supreme Court, and that said lien is claimed for disbursements and costs paid out and expended by the undersigned for the said defendants in the above-entitled action.

Clerk of said court is requested to enter this lien upon the judgment calendar of said court.

HUBBARD, CLARK & DAWLEY,
CHAS. A. CLARK,
Att'ys for Defendants.

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock & G. T. McKenzie. Notice of attorneys' lien. Filed June 18th, 1889. A. J. Van Duzee, clerk.

13 And afterwards, to wit, on the 24th day of October, A. D. 1889, there was filed in the office of the clerk of said court a notice of trial and an amendment to motion; which said notice of trial and amendment to motion are in words and figures following, to wit:

U. S. Circuit Court, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL COMPANY, Plaintiffs,
vs.
R. G. BROCK *et al.*, Copartners, Defendants.

Trial Notice.

To the clerk of said court:

You are hereby notified that the above cause is for trial at the next November, 1889, term of said court, and you are requested to place the same on the trial calendar.

CHAS. A. CLARK,
Attorneys for Defendants.

(Endorsed:) No. 66. Law. U. S. circuit court, northern district of Iowa, eastern division. The Northwestern Fuel Company *vs.* R. G. Brock *et al.*, copartners. Trial notice. Filed this 24th day of Oct., 1889. A. J. Van Duzee, clerk.

14 In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*, Copartners.

Amendment to Motion.

The defendants, R. G. Brock *et al.*, amend their motion heretofore filed in this action as follows:

1. They show that it appears by the files and records in this court in a certain suit in equity, No. 95 in this court, wherein the Northwestern Fuel Company was plaintiff and B. F. Seaton, sheriff, and these defendants and others were defendants, that the said Northwestern Fuel Company by proceeding in equity supplemental to an execution issued in this action, and in aid of said execution, collected on the judgment against the defendants herein on the 30th day of April, 1884, the sum of six hundred and fourteen & $\frac{78}{100}$ dollars, and on the 1st day of May, 1884, the sum of fourteen & $\frac{45}{100}$ dollars, being a total of six hundred and twenty-nine & $\frac{23}{100}$ dollars, for which sums, with interest on the same from the dates they were respectively collected, these defendants move for a judgment in restitution against the plaintiff, The Northwestern Fuel Company, together with the costs of this action.

2. It is further moved that this action be now dismissed for want of jurisdiction by this court, for the reason that no facts showing the jurisdiction by this court are set out in plaintiff's petition, and it has neglected to amend its petition setting forth facts showing jurisdiction, as required by the order heretofore entered in this action.

CHAS. A. CLARK,
Att'y for Def't.

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Amendment to motion. Filed this 24th day of Oct., 1889. A. J. Van Duzee, clerk.

And afterwards, to wit, on the 3d day of December, A. D. 1889, the same being the 2d day of the November term, A. D. 1889, of said court, the following proceedings were had in said cause, as appears of record on folio 5 of the record No. 3 of said court, to wit:

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK *et al.*
} No. 66. Law.

Now, this 3d day of December, A. D. 1889, this cause coming before the court on motion by defendant for restitution, Chas. A. Clark, Esq., appearing for defendant, and plaintiffs appearing by Henderson, Hurd, Daniels & Keisel, its attorneys, and the arguments of counsel having been heard, said motion was duly submitted to the court and by the court taken under advisement.

And afterwards, to wit, on the 4th day of December, A. D. 1889, the same being the 3d day of the November term, A. D. 1889, of said court, the following proceedings were had in said cause, as appears of record on folio 12 of the record No. 3 of said court, to wit:

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK & G. T. MCKENZIE.
} No. 66. Law.

Now, this 4th day of December, A. D. 1889, this cause again coming before the court upon the motion by defendants for a judgment in restitution for money collected by the plaintiff on the original judgment herein, which original judgment was reversed by the Supreme Court, as it appears from its mandate filed herein, and plaintiff appearing by Messrs. Henderson, Hurd, Daniels & Kiesel, its attorneys, and defendants appearing by Charles A. Clark, their attorneys, and the plaintiff having failed to amend its pleadings so as to show jurisdiction of this court as to the subject-matter of the action, and the court finding that the plaintiff has collected from the defendants on the original judgment herein in favor of plaintiff and against defendants the sum of six hundred twenty-nine & $\frac{23}{100}$ dollars on the first day of May, 1884, which said sum, with interest thereon at six per centum per annum from said date, the defendants are entitled

to recover back from plaintiff because said original judgment herein has been and is reversed and set aside:

17 It is therefore ordered and adjudged by the court that the defendants, R. G. Brock and G. T. McKenzie, do have and recover of and from the plaintiff, The Northwestern Fuel Company, the sum of eight hundred and forty dollars ($840.00), with interest thereon at six per cent per annum until paid, together with the costs of this action, taxed at $22.70, with judgment for said costs against C. W. Eaton, surety on the cost bond filed herein, and that said plaintiff pay said sums into this court within twenty (20) days, in default of which payment defendants shall have execution therefor.

To all of which plaintiff at the time excepts.

And it is further ordered that this action be now dismissed for want of jurisdiction as to the subject-matter of this suit.

And afterwards, to wit, on the 26th day of December, A. D. 1889, there was filed in the office of the clerk of said court a writ of error; which writ of error is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before

18 you, between The Northwestern Fuel Company, as plaintiff, and R. G. Brock & G. T. McKenzie, as defendants, a manifest error hath happened, to the great damage of the said The Northwestern Fuel Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of
[SEAL.] the Supreme Court of the United States, the 26th day of December, A. D. 1889.

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed.
O. P. SHIRAS, *Judge.*

2—1159

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Writ of error. Filed this 26th day of December, 1889. A. J. Van Duzee, clerk.

19 And afterwards, to wit, on the 30th day of December, A. D. 1889, there was filed in the office of the clerk of said court an writ of error bond; which bond is in the words and figures following, to wit:

Know all men be these presents that we, The Northwestern Fuel Company, as principal, and E. I. Foster and Charles Weare, as security, are held and firmly bound unto R. G. Brock and G. T. McKenzie in the full and just sum of eighteen hundred dollars, to be paid to the said R. G. Brock and G. T. McKenzie, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

As witness our hands this 26th day of December, 1889.

Whereas lately, at a term of the circuit court of the United States for the northern district of Iowa, eastern division, in a suit pending in said court between the said Northwestern Fuel Company, as plaintiff, and said R. G. Brock and G. T. McKenzie, as defendants, judgment was rendered against said Northwestern Fuel Company, and the said Northwestern Fuel Company has obtained a writ of error and lodged a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said R. G. Brock and G. T. McKenzie, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if
20 the said Northwestern Fuel Company, the plaintiff in error, shall prosecute its writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE NORTHWESTERN FUEL COMPANY,
By HENDERSON, HURD, DANIELS & KEISEL,
Its Attorneys.

E. I. FOSTER.
CHARLES WEARE.

STATE OF IOWA, } *ss:*
Linn County, }

I, the undersigned, being first duly sworn, on oath say that I am a surety in the within bond, and am a resident of this State and am worth double the sum to be secured beyond the amount of my debts, and have property liable to execution in this State equal to the sum to be secured.

E. I. FOSTER.

Subscribed and sworn to before me, a notary public of said State in and for said county, this 27th day of December, 188-.

As witness my official signature and seal.
[SEAL.] CHARLES T. SMITH,
Notary Public.

STATE OF IOWA, } ss:
Linn County, }

I, the undersigned, being first duly sworn, on oath say that I am a surety in the within bond and am a resident of this State,
21 and am worth double the sum to be secured beyond the amount of my debts, and have property liable to execution in this State equal to the sum to be secured.

CHARLES WEARE.

Subscribed and sworn to before me, a notary public of said State in and for said county, this 27th day of December, 1889.
As witness my official signature and seal.
[SEAL.] CHARLES T. SMITH,
Notary Public.

Security and bond approved.

O. P. SHIRAS, *Judge.*

(Endorsed:) No. 66. Law. Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Writ of error bond. Filed this 30th day of December, 1889. A. J. Van Duzee, clerk.

22 And afterwards, to wit, on the 8th day of January, A. D. 1890, there was filed in the office of the clerk of said court an assignment of errors, prayer for reversal, and citation; which assignment of errors, prayer for reversal, and citation are in the following words and figures, to wit:

Assignment of Errors.

To the Supreme Court of the United States:

The Northwestern Fuel Company comes now and says that in the record and proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between said Northwestern Fuel Company, as plaintiff, and R. G. Brock and G. T. McKenzie, as defendants, manifest error hath happened, to the great damage of said Northwestern Fuel Company, and in the following particulars, in and upon each of which said The Northwestern Fuel Company assigns error, to wit;

1.

It assigns as error the rendition of the judgment.

2.

It assigns as error the rendition of the judgment when there is a dismissal of the suit for want of jurisdiction, said judgment and dismissal being in the following terms, to wit:

"It is therefore ordered and adjudged by the court that the defendants, R. G. Brock and G. T. McKenzie, do have and recover of and from the plaintiff, The Northwestern Fuel Company, the sum of eight hundred and forty dollars ($840.00), with interest
23 thereon, at six per cent. per annum, until paid, together with the costs of this action, taxed at $22.70, with judgment for said costs against C. W. Eaton, surety on the cost bond filed herein, and that said plaintiff pay said sums into this court within twenty (20) days, in default of which payment defendants shall have execution therefor; to all of which plaintiff at the time excepts.

"And it is further ordered that this action be now dismissed for want of jurisdiction as to the subject-matter of this suit."

III.

It assigns as error the rendition of the said judgment when it does not appear that the court had jurisdiction to render the same.

IV.

It assigns as error the rendition of said judgment upon the finding of the failure to show jurisdiction.

V.

It assigns as error the assumption of the jurisdiction to render said judgment.

VI.

It assigns as error the rendition of such judgment in a suit whereof the Supreme Court of the United States has held that it did not appear that the circuit court had jurisdiction, and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held.

VII.

It assigns as error the finding preceding said judgment, said finding being in the following terms, to wit:

"The court finding that the plaintiff has collected from the defendants on the original judgment herein in favor of plaintiff and against defendants the sum of six hundred twenty-nine & $\frac{23}{100}$ dollars on the first day of May, 1884, which said sum, with interest thereon at six per centum per annum from said date, the
24 defendants are entitled to recover back from plaintiff, because said original judgment herein has been and is reversed and set aside."

VIII.

It assigns as error such finding when there is a dismissal of the suit for want of jurisdiction.

IX.

It assigns as error said finding when it does not appear that the court had jurisdiction to make the same.

X.

It assigns as error said finding upon the finding of the failure to show jurisdiction.

XI.

It assigns as error the assumption of the jurisdiction to make said finding.

XII.

It assigns as error the making of said finding in a suit whereof the Supreme Court of the United States has held that it did not appear that the circuit court had jurisdiction, and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held; and the record and proceedings aforesaid, together with a prayer for reversal, are herewith presented to the Supreme Court of the United States, with a writ of error sued out by the said Northwestern Fuel Company to such effect; and said Northwestern Fuel Company prays that the errors may be considered and corrected and the judgment aforesaid reversed, annulled, and held for naught, and that said The Northwestern Fue- Company may be restored to all things which
25 it hath lost by occasion of the said judgment.

HENDERSON, HURD, DANIELS & KIESEL,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for the Northwesyern Fuel Company, the Plaintiff in Error.

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Assignment of errors. Filed this 8th day of January, 1890. A. J. Van Duzee, clerk.

Prayer for Reversal.

To the Supreme Court of the United States:

The Northwestern Fuel Company comes now and says that in the record and proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between The Northwestern Fuel Company, as plaintiff, and R. G. Brock and G. T. McKenzie, as defendants, a manifest error hath happened, to the great damage of said The Northwestern Fuel Company, and said Northwestern Fuel Company hath thereupon sued out a writ of error that the record and proceedings may be sent to the Supreme Court of the United States, to the end that error may be corrected and full and speedy jus-
26 tice done: Now, therefore, said Northwestern Fuel Company,

as plaintiff in error, humbly prays for the correction of such error and for reversal of said judgment; and thus will ever pray.

HENDERSON, HURD, DANIELS & KIESEL,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for the Northwestern Fuel Company, the Plaintiff in Error.

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Prayer for reversal. Filed this 8th day of January, 1890. A. J. Van Duzee, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. G. Brock and G. T. McKenkie:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holde- at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein The Northwestern Fuel Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

27 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 26th day of December, 1889.

[SEAL.] O. P. SHIRAS, *Judge.*

Service of above citation acknowledged this 2d day of January, A. D. 1890.

CHAS. A. CLARK,
Attorney for R. G. Brock & G. T. McKenzie, Defendants in Error.

(Endorsed:) No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock & G. T. McKenzie. Citation. Service accepted. Filed this 8th day of January, 1890. A. J. Van Duzee, clerk.

28 UNITED STATES OF AMERICA, *Northern District of Iowa,* } *ss:*

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie, defendants, No. 66, law, as fully as the same remain on file and of record in my office, except such thereof as were heretofore certified and sent to the Supreme Court of the United States in obedience to the writ of error which was

sued out by said R. G. Brock and G. T. McKenzie to reverse the judgment rendered in said circuit court in said case on the 15th day of June, A. D. 1883.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at Dubuque, in said district, this 25th day of January, A. D. 1890.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE, *Clerk.*

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. G. Brock and G. T. McKenzie:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein The Northwestern Fuel Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 26th day of December, 1889.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

O. P. SHIRAS, *Judge.*

Service of above citation acknowledged this 2nd day of January, A. D. 1890.

CHAS. A. CLARK,
Attorney for R. G. Brock and G. T. McKenzie,
Defendants in Error.

[Endorsed:] No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Citation. Service accepted. Filed this 8th day of Jan., 1890. A. J. Van Duzee, clerk.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said circuit court, before you, between The Northwestern Fuel Company, as plaintiff, and R. G. Brock and G. T. McKenzie, as defendants, a manifest error hath happened, to the great damage of the said The Northwestern Fuel Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 26th day of December, A. D. 1889.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed.
O. P. SHIRAS, *Judge.*

[Endorsed:] No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Writ of error. Filed this 26 day of Dec., 1889. A. J. Van Duzee, clerk.

31 *Assignment of Errors.*

To the Supreme Court of the United States:

The Northwestern Fuel Company comes now and says that in the record and proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between said The Northwestern Fuel Company, as plaintiff, and R. G. Brock and G. T. McKenzie, as defendants, manifest error hath happened, to the great damage of said The Northwestern Fuel Company, and in the following particulars, in and upon each of which said The Northwestern Fuel Company assigns error, to wit:

I.

It assigns as error the rendition of the judgment.

II.

It assigns as error the rendition of the judgment when there is a dismissal of the suit for want of jurisdiction, said judgment and dismissal being in the following terms, to wit:

"It is therefore ordered and adjudged by the court that the defendants, R. G. Brock and T. G. McKenzie, do have and recover of and from the plaintiff, The Northwestern Fuel Company, the sum of eight hundred and forty dollars ($840.00), with interest thereon, at six per cent. per annum, until paid, together with the costs of this action, taxed at $22.70, with judgment for said costs against C.

W. Eaton, surety on the cost bond filed herein, and that said plaintiff pay said sums into this court within twenty (20) days, in default of which payment defendants shall have execution therefor; to all of which plaintiff at the time excepts.

"And it is further ordered that this action be now dismissed for want of jurisdiction as to the subject-matter of this suit."

III.

It assigns as error the rendition of the said judgment when it does not appear that the court had jurisdiction to render the
32 same.

IV.

It assigns as error the rendition of said judgment upon the finding of the failure to show jurisdiction.

V.

It assigns as error the assumption of the jurisdiction to render said judgment.

VI.

It assigns as error the rendition of such judgment in a suit whereof the Supreme Court of the United States has held that it did not appear that the circuit court had jurisdiction, and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held.

VII.

It assigns as error the finding preceding said judgment, said finding being in the following terms, to wit:

"The court finding that the plaintiff has collected from the defendants on the original judgment herein in favor of plaintiff and against defendants the sum of six hundred twenty-nine & $\frac{2}{100}\frac{3}{}$ths dollars on the first day of May, 1884, which said sum, with interest thereon, at six per centum per annum, from said date, the defendants are entitled to recover back from plaintiff, because said original judgment herein has been and is reversed and set aside."

VIII.

It assigns as error such finding when there is a dismissal of the suit for want of jurisdiction.

33 IX.

It assigns as error said finding when it does not appear that the court had jurisdiction to make the same.

X.

It assigns as error said finding upon the finding of the failure to show jurisdiction.

XI.

It assigns as error the assumption of the jurisdiction to make said finding.

XII.

It assigns as error the making of said finding in a suit whereof the Supreme Court of the United States has held that it did not appear that the circuit court had jurisdiction and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held.

And the record and proceedings aforesaid, together with a prayer for reversal, are herewith presented to the Supreme Court of the United States with a writ of error sued out by said The Northwestern Fuel Company to such effect; and said The Northwestern Fuel Company prays that the errors may be considered and corrected and the judgment aforesaid reversed, annulled, and held for naught, and that said The Northwestern Fuel Company may be restored to all things which it hath lost by occasion of the said judgment.

HENDERSON, HURD, DANIELS & KIESEL,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for The Northwestern Fuel Company, the Plaintiff in Error.

[Endorsed:] No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Assignment of errors. Filed this 8th day of June, 1890. A. J. Van Duzee, clerk.

34 *Prayer for Reversal.*

To the Supreme Court of the United States:

The Northwestern Fuel Company comes now and says that in the record and proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between The Northwestern Fuel Company, as plaintiff, and R. G. Brock and G. T. McKenzie, as defendants, a manifest error hath happened, to the great damage of said The Northwestern Fuel Company, and said The Northwestern Fuel Company hath thereupon sued out a writ of error that the record and proceedings may be sent to the Supreme Court of the United States to the end that error may be corrected and full and speedy justice done:

Now, therefore, said The Northwestern Fuel Company, as plaintiff in error, humbly prays for the correction of such error and for reversal of said judgment; and thus will ever pray.

HENDERSON, HURD, DANIELS & KIESEL,
DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Attorneys and of Counsel for The Northwestern Fuel Company, the Plaintiff in Error.

[Endorsed:] No. 66. Law. The Northwestern Fuel Company *vs.* R. G. Brock and G. T. McKenzie. Prayer for reversal. Filed this 8th day of Jan., 1890. A. J. Van Duzee, clerk.

35 UNITED STATES OF AMERICA, } *ss:*
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify and return that the writ of error which is hereto attached was served and filed in my office, at Dubuque, Iowa, on the 26th day of December, A. D. 1889, and a copy thereof at the same time lodged in my office, and I now return said writ of error and annexed thereto and hereto attached an authenticated copy of the record of the cause mentioned in said writ, and the following-named papers filed thereon, to wit: The assignment of errors, the prayer for reversal, and the citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Dubuque, in said district, the 25th day of January, A. D. 1890.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE, *Clerk.*

Clerk's costs on appeal & transcript, $12.45.

[Endorsed:] No. —. Law. United States circuit court, northern district of Iowa, — division. —— ——, plaintiff, *vs.* —— ——, defendant. Filed ——, 188–. A. J. Van Duzee, clerk circuit court U. S. —— ——, attorney for plaintiff. —— ——, attorney for defendant. Record, —; page —; fee book, —; page —; judgment for —— rendered in this cause —— term, 188–.

Endorsed on cover: N. Iowa C. C. U. S. No. 1159. The Northwestern Fuel Company, plaintiff in error, *vs.* R. G. Brock and G. T. McKenzie. Filed April 26, 1890.

Clerk's Supreme Court U.S.
FILED,
FEB 9 1891
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1159.

THE NORTHWESTERN FUEL COMPANY, PLAINTIFF IN ERROR.

vs.

R. G. BROCK AND G. T. McKENZIE.

BRIEF FOR PLAINTIFF IN ERROR.

DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1159.

THE NORTHWESTERN FUEL COMPANY, PLAINTIFF IN ERROR.

vs.

R. G. BROCK AND G. T. McKENZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of case. This writ of error is sued out under the Act of February 25th, 1889, Chapter 236. The judgment does not exceed the sum of five thousand dollars. The question for review is whether the Circuit Court had jurisdiction to render the judgment.

The Northwestern Fuel Company brought an action at law in the Circuit Court against Brock and McKenzie. There was a trial to a jury, upon issue joined, and verdict and judgment in favor of the Fuel Company, June 15, 1883, for $1,402.47. Brock and McKenzie brought the case to this court by writ of error, and this court, on April 8, 1889, reversed the judgment, upon the ground that it did not appear, affirmatively, from the record that the Circuit Court had jurisdiction.

Brock vs. Northwestern Fuel Company, 130 U. S., 341, 342–3.

The mandate from this court was then filed in the Circuit Court (Record, Folio 1-5), where Brock and McKenzie thereupon moved (Folio 7), that the action be dismissed unless the Fuel Company should forthwith, by amendment, show a cause of action of which the Circuit Court had jurisdiction. Upon that motion the Circuit Court ordered (Folio 10), that the Fuel Company have leave to file, on or before September 1st, 1889, an amendment to the petition, as to the jurisdiction of the Circuit Court.

The Fuel Company failed to amend by the time fixed, and thereupon Brock and McKenzie filed a motion (Folio 14-15), that the cause be dismissed, for want of jurisdiction, and that a judgment be entered in their favor against the Fuel Company for money stated to have been collected by it on the judgment, together with interest. The motion was supported by an allegation that in April and May, 1884—between the date of the original judgment, and the date of its reversal by this court—the amount of $629.23 had been collected on the judgment, by means of a suit in equity supplemental to and in aid of execution.

Thereupon the Circuit Court rendered judgment (Folio 16–17), as follows:

Now, this 4th day of December, A. D. 1889, this cause again coming before the court, upon the motion by defendants for a judgment in restitution for money collected by the plaintiff on the original judgment herein, which original judgment was reversed by the Supreme Court, as it appears from its mandate as filed herein, and plaintiff appearing by Messrs. Henderson, Hurd, Daniels & Kiesel, its attorneys, and the defendants appearing by Charles A. Clark, their attorney, and the plaintiff having failed to amend its pleadings so as to show jurisdiction of this court as to the subject matter of the action, and the court finding that the plaintiff has collected from the defendants on the original judgment herein in favor of plaintiff and against defendants the sum of six-hundred twenty-nine and 23–100 dollars on the first day of May, 1884, which said sum with interest thereon at six per centum per annum from said date the defendants are entitled to recover back from plaintiff, because said original judgment herein has been and is reversed and set aside:

It is therefore ordered and adjudged by the court, that the defendants, R. G. Brock and T. G. McKenzie, do have and recover of and from the plaintiff, the Northwestern Fuel Company, the sum of eight-hundred and forty dollars ($840.00) with interest thereon at six per cent per annum until paid, together with the costs of this action taxed at $22.70, with judgment for said costs against C. W. Eaton, surety on the cost bond filed herein, and that said plaintiff pay said sums into this court within twenty (20) days, in default of which payment defendants shall have execution therefor. To all of which plaintiff at the time excepts.

And it is further ordered that this action be now dismissed for want of jurisdiction as to the subject matter of this suit.

This writ of error is sued out to reverse this judgment, to which the Fuel Company at the time excepted, as therein shown.

II.

Specification of the errors relied on. The following errors are asserted and intended to be urged. Though, out of caution, they are numerous

in form, they are designed, in substance, to present the single question of the jurisdiction of the Circuit Court to render the judgment.

1. The rendition of the judgment.

2. The rendition of the judgment when there is a dismissal of the suit for want of jurisdiction, said judgment and dismissal being in the following terms, to-wit:

"It is therefore ordered and adjudged by the court, that the defend-"ants, R. G. Brock and T. G. McKenzie, do have and recover of and "from the plaintiff, the Northwestern Fuel Company, the sum of eight-"hundred and forty dollars ($840.00), with interest thereon at six per "cent per annum until paid, together with the costs of this action, taxed "at $22 70, with judgment for said costs against C. W. Eaton, surety on "the cost bond filed herein, and that said plaintiff pay said sums into this "court within twenty (20) days, in default of which payment, defendants "shall have execution therefor. To all of which plaintiff at the time "excepts.

"And it is further ordered that this action be now dismissed for want "of jurisdiction as to the subject matter of this suit."

3. The rendition of the said judgment when it does not appear that the court had jurisdiction to render the same.

4. The rendition of said judgment upon the finding of the failure to show jurisdiction.

5. The assumption of the jurisdiction to render said judgment.

6. The rendition of such judgment in a suit whereof the Supreme Court of the United States has held that it did not appear that the Circuit Court had jurisdiction, and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held.

7. The finding preceding said judgment, said finding being in the following terms, to-wit:

"The court finding that the plaintiff has collected from the defendants "on the original judgment herein in favor of plaintiffs and against de-"fendants the sum of six-hundred twenty-nine and 23–100ths dollars on "the first day of May, 1884, which said sum with interest thereon at six "per centum per annum from said date the defendants are entitled to re-"cover back from plaintiff because said original judgment herein has "been and is reversed and set aside."

8. Such finding when there is a dismissal of the suit for want of jurisdiction.

9. Said finding when it does not appear that the court had jurisdiction to make the same.

10. Said finding upon the finding of the failure to show jurisdiction.

11. The assumption of the jurisdiction to make said finding.

12. The making of said finding in a suit whereof the Supreme Court of the United States has held that it did not appear that the Circuit Court had jurisdiction, and when the record shows no other jurisdictional facts than were shown by the record upon which the Supreme Court so held.

III

Brief of the Argument. The doctrine seems to be established that where there is no jurisdiction in a court to determine the litigation, the cause must be dismissed for that reason, and the court can render no judgment for or against either party. This doctrine has been held applicable both to the Circuit Court and to this court. The doctrine is carried so far as to deny the power, in the absence of a statute conferring it, even to render judgment for costs. Where the Circuit Court renders judgment in a cause in which it has no jurisdiction, the power to award costs in this court, on reversal, is sustained upon the special ground that this court has jurisdiction to correct the errors of the Circuit Court.

"The (circuit) court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there was no jurisdiction there was no power to do anything but to strike the case from the docket." *The Mayor vs. Cooper*, 6 Wall., 247, 250.

"Costs were improperly allowed in the court below, as the case was dismissed for want of jurisdiction on the face of the pleadings, and * * * the decree * * * must be reversed to correct that error." *Hornthall vs. The Collector*, 9 Wall., 560, 566-7.

"Ordinarily, by the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being that where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and as the court can render no judgment for or against either party, it cannot render a judgment even for costs. Nevertheless, there is a judgment or final order in the cause dismissing it for want of jurisdiction." *Mansfield*, etc., *Ry. Co. vs. Swan*, 111 U. S., 379, 387.

"If this (circuit) court has no jurisdiction in the case, it has * * * no power to make any order whatever in the case, except to dismiss it for want of jurisdiction." *Fisk vs. The Union Pacific Railroad Company*, 6 Blatchford, 364 (Blatchford, J.)

"This court cannot give a judgment for costs in a case dismissed for want of jurisdiction." *Strader vs. Graham*, 18 How., 602.

Inglee vs. Coolidge, 2 Wheat., 363, 368.

McIver vs. Wattles, 9 Wheat., 650.

"Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court where the subordinate court was without jurisdiction and has given judgment or decree for the plaintiff or improperly decreed affirmative relief to a claimant." *U. S. vs. Huckabee*, 16 Wall, 414, 435–6.

"It has often been decided that if a suit is dismissed for want of jurisdiction in this court no judgment for the costs of the suit can be given. * * * A different rule prevails when there has been a reversal here, because the Circuit Court did not have jurisdiction, as this court has authority to correct the error of the Circuit Court in taking jurisdiction." *Bradstreet Co. vs. Higgins*, 114 U. S., 262, 263–4.

Mansfield, etc., Ry. Co. vs. Swan, 111 U. S., 388.

"If without jurisdiction it (a court) cannot adjudicate the real merits of the case, it cannot adjudicate any other question, whether it be introductory, incidental, or collateral." Herm. Estop, §68, as cited approvingly in *Robertson vs. State*, 10 Northeastern Reporter, 584 (109 Ind., 79).

It seems to us that the doctrine thus established requires the reversal of the judgment now complained of.

Defendants, very singularly, cite the case reported as *Rose vs. Himely*, 4 Cranch, 241, and *Himely vs. Rose*, 5 Cranch, 313, in support of the judgment now under review. In that case a cargo of coffee belonging to an American was captured by a French privateer, carried into a port of Cuba, and there sold by the captor. The purchaser brought it to South Carolina, where it was libelled in the court of admiralty, by the original American owner. The purchaser defended his title by a sentence of condemnation pronounced by a tribual sitting in Santo Domingo, after the property had been libelled in the court of this country, and by an order of sale in pursuance of such sentence. The American owner contended that the *Santo Domingo tribunal* was without jurisdiction, and the soundness of this contention was the matter determined in the case reported. This court held that the *Santo Domingo tribunal* was without jurisdiction, and hence that the purchaser's title could not be justified by its sentence, and the property ought therefore to be recovered by its original owner.

Defendants rely on the Morris case reported as *Morris's Cotton*, 8

Wallace, 507, and *Ex parte Morris and Johnson*, 9 Wallace, 605, in support of the contention that a judgment in restitution may be rendered by a court which is without jurisdiction of the action. Such a view might possibly be taken by one who should carelessly read the opinion upon page 512 of 8th Wallace, without reference to the facts of the case. (*Morris's Cotton.*) The case was an information *in rem.* on behalf of the United States, against certain cotton alleged to have been seized on land and forfeited under the Acts of Congress, passed during the late rebellion, authorizing the seizure and confiscation of property used for insurrectionary purposes. The information was tried in the District Court as a suit in admiralty. The claimant prayed for a jury, but his prayer was denied. Having been defeated, he brought the case to this court, which reversed the decree, with directions to allow the pleadings to be amended, and to grant a new trial. There was no question of the jurisdiction of the District Court to proceed with the information. The allusions in the opinion to the jurisdiction of the District Court, all have reference to its jurisdiction to proceed as in admiralty *without a jury.* That it had general jurisdiction of the cause is not only apparent from the opinion, but is involved in the action of this court in sending the case back to be tried by a jury. The opinion (p. 512), also points out a different ~~cause~~ course as proper, "where the court "below has no jurisdiction of the case in any form of proceeding."

The word "restitution," so much used by defendants, at best only indicates the nature of the obligation upon which the judgment complained of was rendered. It has no magic to confer jurisdiction upon a court having no jurisdiction of the case in any form of proceeding.

In the Morris case, on the other hand, the court had jurisdiction of the case, including the proceedings wherein the fund was brought into its registry. This court, in that case, having held that the method of trial without a jury was wrong, reversed the case and sent it back for a new trial before a jury, and directed the District Court to issue a writ of restitution, because (8 Wall., 512), "the fund in this case, having been dis-"tributed, a new trial would be useless, unless the fund is restored to the "registry of the court, where it was deposited before the decree of distri-"bution was executed."

Defendants do not attempt to advance any argument of necessity. The cases cited in support of the practice by writ of restitution indicate that it is discretionary. Nothing stronger than promptness or convenience

can be urged for the adoption of that practice in any given case, in preference to leaving the party to his conceded remedy by ordinary action. It would doubtless be a convenience to defendants in the case at bar, to have the remedy of this judgment. If they are remitted to an ordinary action, they may be met by the original demand of the plaintiff, in the form of a set off or counter claim. But if they can enforce this judgment, being protected by the insolvency indicated by the fact that only a part of the former judgment could be collected, they may defy all attempts of plaintiff to collect its original demand. There is nothing, however, in the cases cited, to suggest that jurisdiction in a particular instance may be determined by an inquiry into the practical interests of one of the parties, in view of his financial condition.

It seems to us that the cases cited by defendants do not sustain the jurisdiction of the Circuit Court in the case at bar, and that we are justified in praying a reversal.

DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
FEB 24 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1890.

No. 1159.

NORTHWESTERN FUEL COMPANY, PLAINTIFF IN ERROR,

vs.

R. G. BROCK AND T. G. McKINZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR DEFENDANT IN ERROR.

BY CHAS. A. CLARK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE NORTH-WESTERN FUEL COMPANY, *Plaintiff in Error.*

vs.

R. G. BROCK AND T. G. McKINZIE.

No. 1159.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF IOWA.

BBIEF FOR DEFENDANT IN ERROR.

BY CHAS. A. CLARK.

THE CASE.

The only question involved in this case is whether the court below had jurisdiction to render a judgment in restitution for $840.00.

That sum was collected on a former judgment of the court below in this action, while the same was pending on writ of error in this court without supersedeas.

This court reversed such former judgment for the reason that plaintiff in error is the assignee of a certain contract sued on in this action, and it did not appear from the pleadings that the citizenship of the original parties to the contract was such that an action might have been maintained thereon in the Federal Courts.

Brock vs. Northwestern Fuel Co., 130 U. S. 341.

The mandate of this court upon such reversal having been entered of record in the court below, the plaintiff in error, who was also plaintiff below, was given from June until September in which to amend its declaration, showing jurisdictional facts, if it could. (Record 5 bottom, 6 top.)

Having failed to amend its declaration up to the fourth day of December following the time thus given it for doing so, and the court finding that the sum collected by it on its former judgment against defendants in error amounted with interest to $840.00, rendered judgment in restitution for that amount, together with $22.70, costs of the action. (Record P. 8, 9.)

To reverse this judgment in restitution the pending writ of error was thereupon sued out by the plaintiff below, under the act of Congress of February 25, 1889, chapter 236.

On the motion of defendants in error the cause was advanced, as provided for by rule 32. Plaintiff in error having failed to serve its brief for submission under rule 6, defendants in error now serve their brief and thus bring the writ of error on for submission.

The only error assigned is that the court below had no jurisdiction to render a judgment in restitution for the money collected upon the reversed judgment as above set forth. This alleged error is assigned in twelve different forms, under the evident delusion that twelve times nothing is twelve. (Record P. 16, 18).

BRIEF.

COMMON LAW JURISDICTION TO COMPEL RESTITUTION.

The common law jurisdiction of courts to compel restitution of whatever has been collected or received, upon the reversal of an erroneous judgment, is thus accurately defined.

"In the English courts, the proper remedy, upon the reversal of a judgment, is a *scire facias, quare restitutionem non*, upon which the party recovers all that he has lost by reason of the judgment. (Com. Dig.) (3 D. 20.) (Cro. Car. 699.) And if it appear on the record that the money is paid, restitution will be awarded without a *scire facias*. (2 Salk. 588.)

Clark vs. Pinney, 6 Cowen, 300.

"When money is collected upon an erroneous judgment, which subsequent to the payment of the money is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him."

Ib.

"After property has been taken in execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution, and this is enforced by a writ of restitution. (Cro. Jac. 689; 4 Mod. 161.) When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored. (Roll. Ab. 778; Bac. Ab. Execution, Q.; 1. M. & S. 425.")

Bouvier's Law Dict. "Restitution."

To the same effect, maintaining the inherent common law jurisdiction of the courts are the following decisions:

Duncan vs. Kirkpatrick, 13 Sar. and Rawle, 294.
In Re Shotwell, 10 Johnson, 308.
Sturges vs. Ellis, 10 Wendell, 354.
Commonwealth vs. Bigelow, 3 Pickering, 31.
Chamberlain vs. Choles, 35 N. Y., 479.
People vs. Johnson, 38 N. Y., 66.
People vs. Livingston, 80 N. Y., 70.

See also the following common law authorities:

Ex parte Reynolds. 1 Caines, 500.
Withers vs. Harris, 1 Ld. Raymond, 806.
Doe vs. Lord, 7 Ad. 2 Ellis, 610.

As long ago as 1808 this court ordered restitution of a cargo wrongfully seized in admiralty, saying:

"The sentence and condemnation being considered as *null and invalid* the property is unchanged and therefore ought to be recovered by the libelant in the court below."

Rose vs. Himley, 4 Cranch, 281.

Afterwards it appeared that the cargo had been sold, and on a second appeal to this court from the action of the court below in carrying the mandate of restitution into effect, this court said:

"Restitution of the cargo was awarded. The property having been sold, *the money proceeding from the sales is substituted for the specific articles.* If this money remains in possession of the court it carries no interest. *If it be in the hands of an individual it may bear interest, or otherwise, as the court shall direct.*"

Rose vs. Himley, 5 Cranch, 317.

And this court accordingly, in that case, decreed restitution of the money realized from the sale of the cargo without interest, the special circumstances of the case making the allowance of interest inequitable.

Afterwards in 1832 this court laid down the rule as to restitution as follows:

"On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias*, may be necessary to ascertain what is to be restored. (2. Salk. 587, 588. Tidd's Prac. 936, 1137, 1138.) And no doubt circumstances may exist where an action may be sustained to recover back the money. (6 Cowen, 297.")

Bank of U. S. vs. Bank of Washington, 6 Pet. 17.

The inherent power of the courts to order restitution upon the reversal of an erroneous judgment is discussed and maintained, with a full citation of authorities in

Hiler vs. Hiler, 35 Ohio State, 646.

II.

It avails nothing to say that the court below had not jurisdiction of the original cause in which, by reason of an erroneous judgment, the property of defendants has been seized and appropriated to the use of plaintiff in error.

If the property seized were in possession of the court by its officers, or the money realized therefrom were in the registry of the court, the court would very clearly have jurisdiction to dispose of the property, or the fund, although wrongfully brought into its custody.

The money realized from the defendants having been taken out of the registry of the court and delivered to the plaintiff in error, the ceurt has no less jurisdiction over the plaintiff in error, a party to this suit, to compel the restitution, than it would have to order restitution from its own registry, if the money were there.

This was expressly decided by this court in one of the cases already cited, where the original judgment was null and invalid for want of jurisdiction.

Himley vs. Rose, 5 Cranch, 316.
Same Case, 4 Cranch, 291.

And these decisions have been followed by this court in a subsequent case *where it was held that the court below had no jurisdiction to render the judgment.* The cause was remanded,

"With directions to the district court to cause restitution to be made to the appellants of whatever sum of money they had been compelled to pay, under that decree."

Morris vs. U. S., Wallace, 580.

The money under that decree having been collected in full and disbursed, the court below was at a loss how to execute the mandate of this court, and on subsequent proceedings for a mandamus this court said:

"All distributees within the reach of the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they have received. If they fail to do so they should be dealt with promptly by attachment for contempt. This will in no wise interfere with any other remedy to which the petitioners may be entitled, except that they cannot be paid twice."

Ex parte Morris, et al, 9 Wallace, 607.

And in a similar suit *where it was held that the court below had no*

jurisdiction whatever, this court said:

"But the fund in this case having been disbursed, a new trial would be useless, unless the fund is restored to the registry of the court where it was deposited before the decree of disbursement was executed. Although the district court has no jurisdiction in such a case, still this court has full jurisdiction on appeal to reverse the action of that court and to dismiss the proceedings, or in a case where a new trial is required, to remand the cause and give directions to that effect, and also to direct that a writ of restitution issue to the proper parties to cause the fund to be restored to the registry of the court from which it was erroneously withdrawn."

And the court below was accordingly directed to award such writ of restitution.

Morris's Cotton, 8 Wallace, 512.

It is quite idle to contend that the court below may not, under its inherent powers, issue a writ of restitution voluntarily, which it would be commanded to issue by this court where the facts were in the record showing the necessity for such writ.

The jurisdiction of the court below to order restitution is therefore abundantly sustained by the authorities including the decisions of this court. No other question can be investigated.

III.

COSTS.

No error is assigned on the question of costs.

The court below certainly had jurisdiction to render judgment for the costs pertaining to the motion for, and judgment in restitution. The record does not show that any other costs were awarded. Every presumption is in favor of the regularity of the proceedings in the court below. And the small amount of costs awarded indicates very clearly that the general costs of the action were not taxed against plaintiff in error.

IV.

MOTION FOR TEN PER CENT PENALTY.

Defendants in error submit that the questions presented for decision by plaintiff in error are frivolous, under the repeated decisions of this court, and that the writ of error was sued out for delay only. They therefore ask that a penalty of ten per cent upon the judgment of the court below be imposed upon plaintiff, under the rules of this court, in addition to lawful interest upon said judgment.

CHAS. A. CLARK,
For Defendants in Error.

NOTICE OF SUBMISSION.

To THE NORTHWESTERN FUEL COMPANY, Plaintiffs in Error, or to Francis B. Daniels and D. B. Henderson, Esqs., its attorneys:

You are hereby notified that on Monday, the 16th day of February, A. D., 1891, the defendants in error in the above entitled action, will submit the same to the Supreme Court of the United States, upon the foregoing brief, and the printed record.

Chas. A. Clark. ~~CHAS. A. CLARK~~,
For Defendants in Error.

Service of the foregoing notice and brief accepted and copies received this 26th day of January, A. D., 1891.

(Signed) Francis B. Daniels
For Plaintiff in Error.

FILED.
DEC 10 1890
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE NORTH WESTERN FUEL COMPANY,
Plaintiff in Error,
vs.
R. G. BROCK et al, Co-Partners, etc.
No. 1159.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF IOWA.

MOTION TO ADVANCE.

CHAS. A. CLARK, *for Defendants in Error.*

STATEMENT.

The record on file in this case shows the following facts:

The plaintiff in error, a Minnesota corporation, brought this action at law February 18th, 1882, to recover from the defendants, citizens of Iowa, the sum of $1309.50, alleged to be due, under a written contract made July 21st, 1881, between the defendants, and the What Cheer Land and Coal Company, the benefits of which contract were assigned by that company to the plaintiff.

Plaintiff's declaration does not show whether the What Cheer Land and Coal Company is an Iowa corporation or not, and does not show under the laws of what state or country said corporation is organized.

The cause was originally tried in the court below, and the plaintiff in error recovered a verdict and had judgment thereon against defendants for $1402.47. Defendants brought the cause to this court for review on writ of error, and at the October Term, 1888, the judgment below was reversed, because it did not "appear affirmatively from the record, that the Circuit Court had jurisdiction."

In other words, it did not affirmatively appear from the record, that the original parties to the contract were citizens of different